FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1346

LORRILARD, A Division of Loews Theatres, Inc.,

Petitioner,

—against—

FRANCES P. PONS,

Respondent.

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, AS *AMICUS CURIAE*

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BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, AS *AMICUS CURIAE*

Statement of Interest

Legal Services for the Elderly Poor is funded by Community Action for Legal Services and the United States Department of Health, Education, and Welfare to provide assistance on research and litigation to lawyers dealing with the problems of the elderly. Legal Services for the Elderly Poor is particularly concerned with discrimination in employment against older persons, which is almost universal in the United States, and which denies approximately ten per cent of this country's population the opportunity to earn a living and to contribute to society by continuing to work.

Legal Services for the Elderly Poor has participated as co-counsel or *amicus* in numerous cases before this Court

involving the elderly including *Graham* v. *Richardson*, 403 U.S. 365 (1971), *Allied Chemical Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 107 (1971), *Ortwein* v. *Schwab*, 410 U.S. 656, *reh. den.*, 411 U.S. 922 (1973), and *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976).

All parties have consented to the filing of this *amicus* brief.

The consent letters are annexed.

Question Presented

Does a party have the right to demand a jury trial in an action brought under Age Discrimination in Employment Act of 1967, where the relief sought is lost wages?

Summary of Argument

The age Discrimination in Employment Act of 1967 (hereinafter the "Act" or "ADEA") 29 U.S.C. §§ 621 et seq., authorizes private individuals to seek "legal or equitable relief" through civil action in the District Courts 29 U.S.C. § 626(c). The Act identifies lost wages as one form of legal relief. Traditionally such legal remedies predicate a jury trial.

The enforcement provisions of the Act follow those of the Fair Labor Standards Act (hereinafter FLSA) 29 U.S.C. §§ 216 & 217. Section 216(b) which addresses the private right of action for unpaid earnings, consistently has been read to provide a right to jury trial.

Analogies between the availability of trial by jury in ADEA and in Title VII of the Civil Rights Act of 1964 are inapposite. Title VII differs significantly from ADEA in statutory language, in Congressional intent as evidenced

by the legislative history, and by the underlying policy justifying the legislation itself.

The right to demand a jury trial in civil actions occupies a favored constitutional position. If a cause of action includes a legal issue, compelling the determination of legal rights and remedies, then the Seventh Amendment governs. The claim for lost wages under ADEA represents a claim for legal relief, and is analogous to an action at common law. The joinder of this legal claim with one or more claims for equitable relief arising out of the same factual circumstances does not defeat the right to a jury trial under the Seventh Amendment.

ARGUMENT

POINT I

The Act, in Creating a Cause of Action for the Legal Relief of Lost Wages, and Incorporating the Enforcement Provisions of the Fair Labor Standards Act, Contemplates the Litigant's Right to Demand a Jury Trial.

A. *Statutory Language*

Section 7(c) of the Act, 29 U.S.C. § 626(c), authorizes aggrieved individuals to seek "such legal or equitable relief as will effectuate the purposes of this chapter"[1] through a civil action in the federal District Courts. Sec-

[1] The Congressional statement of purpose is found in Section 2 of the Act, 29 U.S.C. § 621:

"... [O]lder workers find themselves disadvantaged in their efforts to retain employment, ...;

the setting of arbitrary age limits regardless of potential for job performance has become a common practice, ...;

It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; ... 29 U.S.C. § 621(a)(1), (2), & (b).

tion 7(b) 29 U.S.C. 626(b) confers jurisdiction on the federal courts to grant the appropriate "legal or equitable relief", and in the same sentence spells out what that relief might be: "... including without limitation judgments compelling employment, reinstatement, or promotion, or *enforcing the liability of amounts deemed to be unpaid* minimum wages or unpaid overtime compensation under this section." (emphasis added).[2]

In identifying forms of relief, Congress cited specific remedies as examples of either legal or equitable relief. It is well settled that judgments compelling specific performance are equitable in nature. 4 Pomeroy's *Equity Jurisprudence* (5th ed 1941) § 1400, 5 Moore, *Federal Practice* ¶ 38.21 (1977)." [A] statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115-16 (1879), quoted in *U.S.* v. *Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971). If the phrase "legal relief" is to be rendered meaningful, it must be interpreted to include monetary awards for lost earnings, the "amounts deemed to be unpaid . . ." of the Act.

Congress thus has created an action for parties seeking the legal relief of lost or unpaid wages. Such an action, in which the courts administer a legal remedy, traditionally calls for a jury trial. The Seventh Amendment, establishing the right to a jury trial in suits at common law, has long been recognized as applying to actions in which legal rights and remedies, as opposed to merely equitable ones, were being determined *Parsons* v. *Bedford*, 3 Pet. 433, 447

[2] "amounts deemed to be unpaid minimum wages or unpaid overtime compensation" refers to the express incorporation of §§ 216 & 217 of the Fair Labor Standards Act.

(1830).[3] Congress, in specifying that legal as well as equitable relief would be available, must have intended suits in which legal rights and remedies were being determined and juries therefore required. The Act, by its language, has extended to litigants seeking lost wages the right to a jury trial.

B. *Incorporation of FLSA Enforcement Provisions*

Section 7(b) of the Act, 29 U.S.C. § 626(b), in discussing the Act's enforcement scheme, expressly incorporates related provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 216(b), 216(c), 217. Lost wages, the legal issue on which respondent has demanded a jury trial, are "deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of Sections 216 & 217 of this title." 29 U.S.C. § 626(b) In the instant case, respondent initiated her action for lost wages as a private party without any intercession by the Secretary. The relevant FLSA provision is 29 U.S.C. § 216(b), in which individual employees may maintain an action for unpaid minimum wages or unpaid overtime compensation.[4]

[3] The statutory argument is advanced in the context of a Constitution that commands the right to jury trials in civil actions at law. We do not attempt to interpret the Seventh Amendment here, but simply recognize that statutory language was chosen against a background of accepted constitutional practice. The statutory argument is set forth independent of and prior to Constitutional analysis, since the Court will refuse to pass on constitutional issues if other grounds are present on which a case can be decided. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 347 (1936) (Brandeis, J. Concurring), *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909).

[4] The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., prohibiting violations of minimum wage and maximum hours provisions, enforces compliance by both equitable and legal remedies; 29 U.S.C. § 216(b) confers on the employee a right of action against his employer for unpaid minimum wages or unpaid overtime com-

Courts have consistently recognized the right to a jury trial in employee actions brought under § 216(b) for withheld wages or overtime compensation. *Wirtz* v. *Jones*, 340 F.2d 901 (5th Cir. 1965); *Lewis* v. *Times Publishing Co.*, 185 F.2d 457 (5th Cir. 1950); *Olearchick* v. *American Steel Foundries*, 73 F.Supp. 273 (W.D. Pa. 1947). The decisions in *Jones, Times Publishing, & Olearchick*, precede Congressional passage of ADEA, and the explicit holding that aggrieved employees were entitled to a jury trial in their suits for back wages has never been denied in the federal courts. Congress, in incorporating § 216, and implicitly this line of cases, into ADEA made certain the resultant availability of juries.

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pensation, and for liquidated damages; 29 U.S.C. § 216(c) permits the employee to waive his rights under § 216(b), and to request that the Secretary of Labor bring an action to recover deficiencies in compensation after prior judicial decisions have finally settled all issues of law; 29 U.S.C. § 217 provides for a suit by the Secretary to enjoin violations of the minimum working standards and to restrain discriminatory discharges resulting from employee participation in enforcement proceedings. The action may include a plea by the Secretary for restraint of the withholding of unpaid compensation.

Courts have favored the right to jury trial in § 216(c) actions, *Mitchell* v. *City Ice Co.*, 273 F.2d 560 (5th Cir. 1960), *Wirtz* v. *Turner*, 330 F.2d 11 (7th Cir. 1964), and have denied the right to a jury trial in § 217 actions *Wirtz* v. *Jones*, 340 F.2d 901 (5th Cir. 1965), *Hodgson* v. *Stewart In-Fra-Red Commissary Inc.*, 370 F. Supp. 503 (E.D. Pa. 1973). In *Mitchell* v. *Robert De Mario Jewelry Inc.*, 361 U.S. 288 (1960) this Court held that the District Court had jurisdiction-in equity in an action brought by the Secretary under § 217 to include an order to reimburse back wages along with an order for reinstatement. The decision clearly supports the holding in *Wirtz* v. *Jones* and *Hodgson* v. *Stewart In-Fra-Red Commissary Inc.*, *supra*.

All of the above decisions address actions brought by the Secretary in his capacity of service to the public interest. They raise issues concerning the FLSA which will not be addressed here. *See* Note *Fair Labor Standards Act & Trial by Jury*, 65 Colum. L.Rev. 514 (1965).

The instant action, brought by respondent as a possible litigant, is linked to the 'private right of action' provision of FLSA, i.e. § 676(b).

During the course of Senate consideration of ADEA, Senator Javits remarked on the floor that in determining liability under the Act, "[a] jury will answer yes or no." 113 Cong. Rec. 31255 (1967). This statement that juries would hear ADEA cases raised no objections or inquiries on the Senate floor.

Accordingly it is respectfully submitted that the incorporation of § 216(b) is susceptible of no interpretation other than that Congress intended and created the right to demand a jury trial for all individual employees seeking the relief of lost wages under ADEA.

C. Title VII Distinguished

Attempts have been made by some lower courts[5] to analogize the enforcement procedures of ADEA to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g). ADEA is in one sense a legislative offspring of Title VII,[6] and the two Acts call for virtually identical prohibitory procedures. But the statutory language on enforcement, the legislative history addressing modes of trial, and the underlying policy considerations of 42 U.S.C. § 2000e-5(g) are significantly different and must be distinguished from corresponding factors in ADEA.

In § 2000e-5(g), Congress selected language strongly implying that available relief is exclusively of an equitable

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[5] In *Hannon* v. *Continental National Bank*, 427 F.Supp. 215 (D. Colorado, 1977) the Court relies heavily on an affiliation in remedial provisions and purposes between ADEA and Title VII. In *Morelock* v. *N.C.R. Corp.*, 546 F.2d 682 (6th Cir. 1976) and *Polstorff* v. *Fletcher*, 430 F.Supp. 592 (N.D. Ala. 1977) the court assimilates the purpose and purportedly broad remedial language of ADEA to that of Title VII.

[6] Section 715 of the Civil Rights Act of 1964 (PL 88-352) directed the Secretary of Labor to make a study of the problem of age discrimination in employment. H.R. Rep. No. 805, 90th Cong., 1st Sess. *reprinted in* [1967] U.S. Code Cong. & Ad. News 2214.

nature, to be awarded at the discretion of the court.[7] An order compelling reinstatement or hiring may be "with or without back pay". The provision that a court *may* issue injunctions or orders upon finding violations, and that the order *may* include reinstatement which *may* in turn be accompanied by back pay indicates the expectation that judicial discretion will be exercised in determining all forms of relief. After listing various specific forms of relief, the sentence finishes with "*or any other equitable relief* as the court deems appropriate" (emphasis added). The construction doctrine of *ejusdem generis* leads to the conclusion that *only* equitable forms of relief are permitted, and that discretionary awards of back pay were not intended as damage actions at common law that would trigger a jury trial.[8]

[7] The relevant text of § 2000e-5(g) is as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

[8] See Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U.Ohio L. Rev. 167 (1969): "Nowhere, so far, has it been argued seriously that Congress intended to provide for jury trials. . . . The language . . . would suggest that the statute contemplates that the judge without a jury will determine all appropriate relief in a single order." *Id.* at 169-70. *Accord, Developments in the Law—Employment Discrimination & Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1264-69 (1971). *Cf. Equal Employment Op. Com'n* v. *Detroit Edison Co.*, 515 F.2d 301, 308-309 (6th Cir. 1975), applying the doctrine of *ejusdem generis* in holding that punitive damages, as legal relief, are not awardable under Title VII.

This reading of the statutory language is reinforced by the legislative history of Title VII. Opponents of the Act criticized the prospect of "government by injunction," fearing that suits in equity would strip defendants of many constitutional protections including the right to a jury trial. *See E.g.* H.R. Rep. No. 914, 88th Cong. 2nd Sess., *reprinted* in [1964] U.S. Code Cong. & Ad. News 2415. During the floor debates, Senator Case, who was a moving force behind Title VII, and Senator Ervin engaged in the following colloquy:

> Mr. Ervin. Under Title VII, an order can be entered ordering a man to pay back wages to a person who had never done a day's work for him. The amount of back wages may largely exceed the jurisdictional amount requiring a jury trial in common cases under the Constitution. Title VII contains no requirement for a jury trial under any circumstances?
>
> Mr. Case. So far as the Act itself is concerned, there is no provision for jury trial. Of course, whether a jury trial would be required would depend upon the Supreme Court in developing further its decision of the day before yesterday in the Barnett case. A jury trial might be provided if the penalty were heavy enough.
>
> Mr. Ervin. No jury trial is provided.
>
> Mr. Case. No jury trial is provided under the terms of this section.

110 Cong. Rec. 7255 (1964).

The enforcement provisions of ADEA include none of this clear-cut opposition to jury trials but its recognition as mentioned above. The provisions of § 216(b), incorporated into § 626(b), do not allow for the type of equitable discretion available under Title VII: any violator "*shall* be liable to the employee or employees affected in the amount

of their unpaid minimum wages or their unpaid overtime compensation . . ." (emphasis added). Once liability has been established, the dispensing of relief in the form of monetary damages occurs automatically just as it would in a common law contract action for damages. *See e.g. Olearchick* v. *American Steel Foundries,* 73 F.Supp. 273 (W.D. Pa. 1947). The contrast is there clearly drawn, for as this Court stated, in Title VII actions: ". . . back pay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke." *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975).

In the course of Senate consideration of ADEA, Senator Dominick raised the issue of possible conflict between the administration of Title VII and ADEA. Senator Javits in his reply stated that the two Acts "will operate completely independently of each other, as will the enforcement procedures," 113 Cong. Rec. 31255 (1967). Congress was not intending to duplicate the enforcement provisions of Title VII, simply because it had a new piece of legislation which also dealt with discrimination in employment.

Underlying these crucial differences in statutory language and legislative history, Title VII and ADEA approach the problems of enforcement from different conceptual bases. Title VII is part of the 1964 Civil Rights Act, which called for extraordinary action in response to a problem of historic and Constitutional magnitude. The House Judiciary Committee, in its General Statement as it reported the Bill out, stressed that one hundred years after formal emancipation, blacks were still denied "the rights, privileges and opportunities which are considered to be, and must be, the birthright of all citizens."[9] The Congressional response was an attack on discrimination in a variety of settings, of which employment was one. Within the area of employment Congress created a whole new administrative agency, not responsible to any pre-existing Cabinet-level departments. Congress' decision to create an action for employment discrimination based on race, triable only to a judge, may reflect its fears of jury bias against plaintiff claims in such suits[10] or its sense of the urgency of the problem which the delay attendant to a jury trial would only exacerbate.[11] Whatever its motivations, Congress in creating the Equal Employment Opportunity Commission (EEOC) and establishing the right to sue as accruing under this totally new agency, was implementing what it considered to be an extraordinary remedy.

ADEA, in contrast, is a more straightforward and 'ordinary' piece of legislation and is administratively tied to the Department of Labor. The purpose of the legislation, as reported out by the House Education and Labor Committee, is stated simply: "It is the purpose of H.R. 13054 to promote the employment of older workers based on their

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[9] H.R. Rep. No. 914, 88th Cong., 2nd Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News, 7393. The General Statement refers further to the Bill resting upon the authority of "[a] number of provisions of the Constitution of the United States;" and to the urgency of a national need which requires national legislation to meet it. *Id.* at 2393.

[10] Defendants in the South apparently agree that there may be prejudice on a jury, and have sought to take advantage of it. The great majority of jury demands in Title VII cases have come from southern defendants in cases which racial discrimination was alleged. *Developments in the Law, supra,* note 7 at 1264 n. 371. *See also* Comment *supra,* note 7 at 167. *Cf. Curtis* v. *Loether,* 415 U.S. 189, 191-192 (1974), discussing the similar concerns of supporters in Congress with regard to Section 812 of the Civil Rights Act of 1968.

[11] *Developments in the Law, supra,* note 7 at 1265. *See also* Note, *Ross* v. *Bernhard: The Uncertain Future of the Seventh Amendment,* 81 Yale L.J.112, 123-26 (1974). On the particular urgency of the race discrimination issue, see [1964] U.S. Code Cong. & Ad. News *supra,* note 9.

ability." H.R. Rep. No. 805, 90th Cong. 1st Sess., *reprinted* in [1967] U.S. Code Cong. & Admin. News 2214. No mention is made of historical reverberations. The Act is intended to deal solely with problems of employment, and its enforcement mechanism is derived from already existing procedures within the Department of Labor not the specially created EEOC. Basically this is an Act addressing the problem of discharged or unhired older employees: it relies on long-standing enforcement procedures operating within an established Cabinet-level department. In prescribing a remedy, Congress had no reason to reach for the extraordinary. When legal claims and issues are being reviewed in court, a jury of one's peers, the collective judgment of twelve men and women arrived at through open-minded discussion, is the preferred means of reaching a verdict.

POINT II

The Seventh Amendment of the United States Constitution Entitles a Party to Demand a Jury Trial in an Action Raising the Legal Issue of Lost Wages Under ADEA.

A. *Constitutional Policy Favors Jury Trials in Civil Actions*

In the preceding section, we have demonstrated that the Act in its choice of language and its enforcement provisions contemplated the right to a jury trial for parties involved in a claim to lost wages. Assuming, *arguendo,* that the Act does *not* reveal a specific Congressional intention and language on the jury trial issue, we turn to the Constitutional question of whether a right to jury trial exists in this context.

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal

jurisprudence . . . [It] should be jealously guarded by the courts." *Jacob* v. *New York City,* 315 U.S. 752 (1942). The command of the Seventh Amendment[12] has been extended to cover all actions in which legal rights and remedies, including those created by statute, are being determined. *Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830), *Curtis* v. *Loether,* 415 U.S. 189, 193 (1974).[13] The Amendment in addressing itself directly and specifically to the federal courts, calls for a uniformity of protection without deference to Executive or Legislative encroachment. The federal policy favoring jury trials has been deemed "of historic and continuing strength." *Simler* v. *Conner,* 372 U.S. 221, 222 (1963). *See Parsons* v. *Bedford supra, Scott* v. *Neely,* 140 U.S. 106 (1891), *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959), *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962).

B. *Right to Jury Trial Depends on Nature of Issue to be Tried, Legal v. Equitable*

When Congress, in creating new rights of action, fails to provide expressly for the mode for trial, the right of action should be analogized to its historical counterpart at law or in equity, in order to determine whether a right to jury trial exists. "The proposition that we should look to history for guidance is well settled." *Rogers* v. *Loether,* 467 F.2d 1110, 1116 n.20 (7th Cir. 1972), *aff'd Curtis* v. *Loether,*

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[12] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law" U.S. Const., amend. VII.

[13] This Court, in *Curtis* v. *Loether,* cites a number of instances in which it has found the Amendment applicable to causes of action based on statutes. *Eg. Dairy Queen Inc.* v. *Wood,* 369 U.S. 469, 477 (1962) (trademark laws); *Hepner* v. *United States,* 213 U.S. 103, 115 (1909) (immigration laws); *Fleitmann* v. *Welsbach Street Lighting Co.,* 240 U.S. 27 (1916) (antitrust laws).

415 U.S. 189 (1974). *See* 5 *Moore Federal Practice* ¶38.11 [7] (1946); 9 Wright & Miller, *Federal Practice and Procedure* § 2302 (1971).

The right to jury trial is preserved by the Seventh Amendment on the basis of the division that existed between suits at common law and suits in equity under English common law and chancery practice at the time the Amendment was adopted.[14] The application of the Amendment, however, has never been confined to those writs enforceable at common law in 1791. As Justice Story stated in *Parsons* v. *Bedford*, 3 Pet 433, 447 (1830),

> "By common law, they meant what the constitution denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . .
>
> In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to set the legal rights.

[14] Justice Story stated, with reference to the Seventh Amendment, in *United States* v. *Wonson*, (cc defendant Mass. 1812) 1 Gall. 5, 20, 28 Fed Cas 745, 750, N. 16, 750: "Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence."
The Constitutional Convention had rejected a proposal securing the right to jury trial "as usual in civil cases," because of the contrast and diversity in the several states concerning civil jury trial practices.
Capital Traction Co. v. *Hof*, 174 U.S. 1, 6 (1899), See *The Federalist* No. 83.

It is clear that the "legal rights" triable to a jury may arise from causes of action created by Congressional enactment. *Curtis* v. *Loether, supra, Hepner* v. *United States*, 213 U.S. 103 (1909).

The focus of the Seventh Amendment question is whether a particular *issue* to be tried is of a legal or equitable nature, not whether the action as a whole should be characterized as legal or equitable *Ross* v. *Bernhard*, 396 U.S. 531, 538 (1970), *Dairy Queen Inc.* v. *Wood*, 369 U.S. 469 (1962), *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959).

In *Ross* this Court advanced a three-pronged test for determining the "legal" nature of an issue, *id.* at 538 n.10. The three elements are (i) pre-merger custom, *i.e.* whether the claim on this issue would have sounded in law when there existed separate courts of law and equity; (ii) whether the remedy sought is a traditional form of relief offered in courts of law; (iii) whether a jury is capable of making the necessary factual determinations so as to arrive at a verdict. These three elements have been applied subsequently by this and lower courts to civil causes of action created by federal statute. *Curtis* v. *Loether, supra, Cleverly* v. *Western Electric Co.*, 69 F.R.D. 348 (W.D. Mo. 1975), *Chilton* v. *National Cash Register Co.*, 370 F. Supp. 660 (S.D. Oh. 1974).

This Court's recognition of an expressed Congressional intention to limit the right to jury trial based on a particular statutory scheme or purpose, does not support any similar limitation as regards ADEA. In *Katchen* v. *Landy*, 382 U.S. 323, 339-40 (1966) the court relied on the existence of a "specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury", to affirm the summary jurisdiction of bankruptcy court in certain bankruptcy proceedings. The ADEA, un-

like the Bankruptcy Act, contains no indication of a statutory scheme limiting the right to a jury trial. The court would need some clear sign from Congress before acting to limit this right in any way. But Congress provided no such sign: indeed a reading of the statute and legislative history supports a contrary inference. Moreover, in light of the Constitutional policy favoring jury trials in civil actions, Congress must provide an adequate justification before the Court will permit the Seventh Amendment to be so confined.

> "... when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974).[15]

[15] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937) is not to the contrary. As interpreted by this Court in *Curtis* v. *Loether*, *supra* at 194, *Jones & Laughlin* by denying the applicability of the Seventh Amendment to a statutory proceeding, "merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme." *Cf. Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946) (Emergency Price Control Act of 1942, § 205(a)) and *Mitchell* v. *Robert De Mario Jewelry Inc.*, 361 U.S. 288 (1960) (Fair Labor Standards Act § 217), holding that the District Courts had equitable jurisdiction to award certain forms of monetary relief in actions initiated by the Authorized government official, *i.e.* Administrator or Secretary. In both instances, the Court relied in large part on the justification that enforcement in equity was integral to the fulfillment of a publicly oriented statutory purpose. In both instances reliance on this statutory purpose was linked to a 'public' right of action, which could be initiated only by the Administrator or Secretary, not by a private litigant. *But see* Note, *Congressional Provision for Non Jury Trial Amendment*, 83 Yale L.J. 401, 405 (1973), citing the right to jury trial for causes of action in which the public at large is vitally interested, *Hepner* v. *United States*, 213 U.S. 103 (1909), *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916).

In the absence of an express provision by Congress indicating the mode of trial, the right of action created by ADEA will be analyzed according to the *Ross* test.

C. *Application of Ross Test*

An action for back pay under 29 U.S.C. § 626 has a clear analogue in the legal right that is actionable upon breach of contract for wrongful discharge. According to the English common law, a servant wrongfully discharged may treat the contract as continuing and sue for breach by reason of dismissal, *Emmems* v. *Elderton*, 4 H.L. Cas. 625, 646, 10 Eng. Rep. 606, 615 (1853).[16] *Accord Pierce* v. *Tennessee Coal, Iron & Railroad Co.*, 173 U.S. 1 (1899); 4 Corbin, *Contracts* § 958 (1964). An identity between the monetary measure of damages for wrongful discharge at common law and the statutory measure called for under ADEA supports the historical analogy. The common law entitled the wrongfully discharged employee to what he would have received had there been no breach, less what he earned or might reasonably have earned in other employment of like nature *Taylor* v. *Tulsa Tribune Co.*, 136 F.2d 981, 983 (10th Cir. 1943), 11 Williston, *Contracts* § 1358 (3rd ed. 1968), Corbin *supra* at § 958. The federal courts have accepted this approach to the measurement of damages in an action for lost wages under ADEA *Laugesen* v. *Anaconda*, 510 F.2d 307, 317-18 (6th Cir. 1975), *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 373 (8th Cir. 1974),

[16] For an extended discussion of historical analogies between a Title VII action for back pay by an unlawfully dismissed employee and various possible writs under the common law of contract, see *Ochoa* v. *American Oil Co.*, 338 F.Supp. 914 (S.D. Texas 1972). This Court recognized in *Curtis* v. *Loether*, *supra* at 197, that the issue of the right to jury trial under Title VII back pay suits had not been squarely presented. So too that question is not presented by the instant case, in light of the substantial differences in legislative language and history between ADEA and Title VII.

Bishop v. *Jelleff Associates*, 398 F.Supp. 579, 597 (D.D.C. 1974), *Combes* v. *Griffin Television, Inc.*, 421 F.Supp. 841, 843-44 (W.D. Okla. 1976).[17]

In the alternative, a statutory action for back pay under ADEA should be analogized to the law of tort. The Act defines a new legal duty for employers, the duty not to discharge an individual because of his age, 29 U.S.C. § 623(a)(1). Courts are authorized, under § 626(b) to compensate a plaintiff for the injury caused by defendant's tortious act *cf. Curtis* v. *Loether*, 415 U.S. 189, 195 (1974). The discharge of an employee, motivated by the age factor but justified publicly on the false ground that the employee is incompetent, is a form of defamation that is actionable.[18]

The statutory tort is also an amplification of the breach of contract for wrongful discharge action. The Act recognizes the common law of contract and of tort, and enlarges them both. Non-performance of an agreement to continue employment because of age is, under the provisions of ADEA, a failure to fulfill a duty of conduct imposed by law. This violation of a legally imposed duty invades the employee's interest in his reputation for capability as a worker. All of the above actions have a feel of factcity

[17] In *Bishop* v. *Jelleff Associates*, 398 F.Supp. 579 (D.D.C. 1974) the Court spells out the formula, in terms consistent with Williston's formulation:

> "Back pay is measured by the difference between the salary an employee would have received but for a violation of the Act and the salary actually received from other employment, less unemployment benefits. The relevant period for measuring back pay begins with the time of the loss of employment as a result of the violation and ends when the affected employee accepts or declines reinstatement." 398 F. Supp. at 597.

[18] *Cf. Meyerson* v. *Hurlbut*, 68 App. D.C. 360, 98 F.2d 232 (1938), *cert. denied*, 305 U.S. 610, *Braun* v. *Arneur & Co.*, 254 N.Y. 514, 173 N.E. 845 (1930), declaring that false words prejudicial in a pecuniary sense to a businessman or merchant were actionable for defamation.

about them, for which a jury has traditionally been deemed peculiarly sensitive.

In addition to the historical analogies between a suit for lost wages under ADEA and actions at law, the remedy sought by respondent is of the sort traditionally offered in courts of law. The award of monetary relief need not always be designated "legal relief", *Curtis* v. *Loether*, *supra* at 196: an award of actual or punitive damages is legal, but the remedy of restitution may be an equitable one. A significant distinction between damages and restitution lies in whether the injured party has a claim for *uncompensated* performance.[19] When the complaining party has performed fully or in part, and seeks recovery of what he actually has rendered or its equivalent monetary value, the relief sought is restitution, *see e.g. Economy Swimming Pool Co.* v. *Freeling*, 236 Ark. 888, 891, 370 S.W.2d 438, 440 (1963); *Sylvania Industrial Corp.* v. *Lilienfeld's Estate*, 132 F.2d 887 (4th Cir. 1943). A complaining party who sues for damages is seeking a monetary award for performance he did *not* complete, on the basis that he would have completed it if the defendant's action had not in effect prevented his performance *see e.g. Adler* v. *Drudis*, 30 Cal.2d 372, 382, 182 P.2d 195, 201 (1947), *Miller* v. *Robertson*, 266 U.S. 243, 257 (1924). In an action for lost wages based on discriminatory discharge, the theory of restitution is not applicable. Respondent is not seeking compensation for labor previously performed from which petitioner has already benefited. The facts of this case are thus distinguishable from those of *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), where the Administrator sought compensation for tenant overcharges, claiming in effect that defen-

[19] See comparative discussion of restitution and damages as forms of relief in 5 Corbin, *Contracts* §§ 1102, 1107 (1964 ed.). For discussion of the remedy of restitution, see *12 Willison, Contracts* § 1455 (1970 ed.).

dant had benefited already (and unjustly) from receipt of excess intake. That claim was for restitution: it sounded in equity without a right to jury trial. Respondent herein has no monetary claim for the value of any completed performance: she seeks an award for what she would have received had she been allowed to render performance, which is the traditional damages award in actions at law.[20]

On the question of jury abilities and limitations, there are no practical obstacles to a jury's determination of the issues presented in a discriminatory discharge action. As Justice, then Judge, Stevens stated in *Rogers* v. *Loether*,[21] regarding an analogous case of discriminatory refusal to rent "Typically, the facts are not complex and decision turns on appraisals of credibility and motive. Certainly such matters are far more suitable for jury determination than complicated commercial issues that routinely arise in derivative and antitrust litigation." *Id.* at 1118. Juries traditionally have been permitted to resolve factual issues, and apply facts to legal rules in actions for legal relief involving fraud,[22] infringement of patent,[23] and private antitrust actions.[24] There is no basis for assuming that they are not able to determine liability and compute a lost wages damages award in an action under ADEA.

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[20] See Note, *Congressional Provision for Non Jury Trial, supra* note 14, at 407-408.

[21] 467 F.2d 1110 (7th Cir. 1972) *aff'd Curtis* v. *Loether*, 415 U.S. 189 (1974).

[22] *e.g. Smyth Sales Inc.* v. *Petroleum Heat & Power Co., Inc.*, 141 F.2d 41 (3rd Cir. 1944).

[23] *e.g. Bereslavsky* v. *Caffey*, 161 F.2d 499 (2nd Cir. 1947).

[24] *e.g. Transmirra Products Corp.* v. *Monsanto Chemical Co.*, 27 F.R.D. 482 (S.D.N.Y. 1961).

D. *Legal and Equitable Issues Joined in One Action*

When legal and equitable claims are joined in one action, a claim that is basically legal does not lose its character as such because it is joined to a claim for equitable relief. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), *Dairy Queen Inc.* v. *Wood*, 369 U.S. 469 (1962), *Scott* v. *Neely*, 140 U.S. 106 (1891). Issues integral to the legal claim also may be relevant to the equitable claim. In such circumstances, a jury trial of the legal issues takes precedence over any prior determination of equitable claims. *Beacon Theatres, Inc.* v. *Westover*, *supra*, at 510-511, *Curtis* v. *Loether*, 415 U.S. 189, 196 n.11 (1974).

Respondent in the instant action seeks both legal and equitable relief, as she is entitled to do under 29 U.S.C. § 626(b) and 626(c). The question of whether her claim for lost wages is characterized as incidental to her claim for injunctive reinstatement is not relevant to the determination of her rights under the Seventh Amendment.

> "It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of *Beacon Theatres*, as we construe it."

Thermo-Stitch, Inc. v. *Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961) cited with approval in *Dairy Queen Inc.*, *supra* at 473 n.8.[25] If a private action for lost

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[25] The Sixth Circuit, in *Morelock* v. *N.C.R. Corp.*, 546 F.2d 682 (1976), holds that an action under ADEA seeking back pay, reinstatement and injunctive relief is "essentially equitable in nature," *id.* at 689; and finds no constitutional right to a jury trial on the issue of back pay. This decision is inconsistent under the holdings of *Beacon Theatres* and *Dairy Queen*.

wages under ADEA is triable to a jury upon timely demand, then a private action seeking *inter alia* lost wages also must be protected by the Seventh Amendment.

CONCLUSION

For the reasons stated above, the decision of the court below should be affirmed.

JONATHAN A. WEISS
Legal Services for the Elderly Poor
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

(Letterhead of Smith, Patterson, Follin, Curtis & James)

July 15, 1977

Mr. Jonathan A. Weiss
Legal Services for the Elderly Poor
2095 Broadway
New York, New York 10023

Re: Frances P. Pons, Respondent v. Lorillard, A Division of Loew's Theatres, Inc., Petitioner, No. 76-1346

Dear Mr. Weiss:

We acknowledge your request to participate by filing amicus curiae briefs in the above-entitled action. This letter is to advise you that you have our consent as counsel for the plaintiff/appellee to submit amicus curiae brief on behalf of the right to a trial by jury.

We appreciate your interest in this case and we hope that a mutually satisfactory resolution can be obtained from the Supreme Court.

Smith, Patterson, Follin,
Curtis & James

By: JONATHAN R. HARKAVY

(Letterhead of Brooks, Pierce, McLendon,
Humphrey & Leonard)

July 19, 1977

Mr. Jonathan A. Weiss
Legal Services for the Elderly Poor
2095 Broadway
New York, New York 10023

Re: Lorillard v. Pons—No. 76-1346
United States Supreme Court

Dear Mr. Weiss:

Petitioner Lorillard hereby gives its written consent to the Legal Services for the Elderly Poor filing an amicus curiae brief on the merits in the above case.

Very truly yours,

THORNTON H. BROOKS
Thornton H. Brooks

THB:ptm